by the Supreme Court, is a question that passes the understanding of mere reason, and can be answered only by those whose faith in our institutions brings their minds into communion with the minds of those who guard our institutions.

R. L. H.

CONDEMNATION OF PROPERTY FOR THE PUBLIC WELFARE.—In a recent Minnesota case, *State ex rel. Twin City Bldg. & Inv. Co.* v. *Houghton* (Minn. 1920) 176 N. W. 159, the court upon reargument upheld as constitutional a statute designed to establish residential districts in cities of the first class. The statute provided for the restriction of property in a designated district against its use for apartment houses and contained a provision for compensation to the owners of such property by proceedings in eminent domain. Minn. Laws 1915 c. 128, Gen. Stat. Supp. (1917) §§ 1639 (10-16). The relator, who had been denied a permit to erect an apartment house on his property, brought this action contesting the constitutionality of the statute on the ground that the legislature had no power to condemn his property for this purpose, since it was not a taking for a public use.[1] The court in upholding the statute relied mainly on three arguments: (1) the legislature is presumably correct when it declares a use public; (2) provisions of this sort tend to stabilize property values, and a diminution of such values tends to reduce state and municipal taxes,—a measurable public loss; (3) the legislature has the power to take property, with compensation, for purely aesthetic purposes.[2]

It is well settled that the power of eminent domain cannot be exercised except for a "public use". Two views have grown up as to the meaning of this phrase, the one that "public use means use by the public", the other, that it is "equivalent to public benefit, utility and advantage".[3] Under the former theory it would seem impossible to sustain the instant case. As the court admits, "the public gets no

[1]This court had decided on a previous hearing, (1919) 174 N. W. 885, against the constitutionality of the statute, on the grounds that the condemnation was neither for a public use nor a valid exercise of the police power. For a criticism of this decision see 20 Columbia Law Rev. 219.

[2]But the court indicated that were no compensation provided, it would feel bound to hold such a statute unconstitutional. For this proposition it cited Commonwealth *v.* Boston Adv. Co. (1905) 188 Mass. 348, 74 N. E. 601. In that case the court refused to uphold an ordinance prohibiting billboards on the ground that no compensation was provided and that the ordinance was not shown to be a protection of either the "public safety, health, peace, good order or morals". Hence, the statement that property may be taken for purely aesthetic purposes is mere *dictum*. It should be noted that in a recent case, Cusack Co. *v.* City of Chicago (1917) 242 U. S. 526, 37 Sup. Ct. 190, followed in St. Louis Poster Adv. Co. *v.* St. Louis (1919) 249 U. S. 269, 39 Sup. Ct. 274, the Supreme Court of the United States actually did uphold an ordinance prohibiting billboards without compensation, but on p. 530 of the *Cusack* case it was careful to state that it did so "in the interest of the safety, morality, health and decency of the community". The court in the *St. Louis* case, at p. 274, actually admitted that the interest protected was to a considerable extent aesthetic.

[3]1 Lewis, Eminent Domain (3rd ed.) §§ 257, 258. Mr. Lewis makes a strong argument for the former concept, particularly on the ground of its certainty, but the tendency of modern courts would seem to be against him.

physical use of the premises condemned". The payment of compensation, of course, would then be immaterial, the taking being clearly for private purposes. But under the second theory, undoubtedly adopted by the court, we get the more interesting consequences. "Taking property for the public benefit" seems remarkably close to a definition of the police power. In cases of this sort the courts have consistently sanctioned the exercise of the police power for the establishment of restricted residential districts only where they have been convinced that it was necessary to further the public safety, health, order or morals.[4] Thus we have the Los Angeles zoning cases, in which the establishment of residential districts was upheld as a valid exercise of the police power.[5] These cases culminated in the Supreme Court, in a decision in which the State court was affirmed in upholding as constitutional an ordinance, interpreted to prohibit the operation of a brick yard in a residential district, as a valid exercise of the police power, in that it protected the public health.[6] The courts have never gone so far as to justify the exercise of the police power, in which no compensation is provided, purely to satisfy aesthetic taste.[7] Will they do so in the case of eminent domain, where compensation is provided?

The court in the principal case cites several cases to support its decision in which the power of eminent domain has been upheld, even though exercised partly for aesthetic purposes.[8] But the court has failed to note that in these cases "public use" seems to have been synonymous with use by the public. This fact, of course, renders these cases of little aid in grappling with the problem before the court. The interesting question is: would these same courts have arrived at the same conclusion if, although under their test the use was clearly private, it nevertheless inured to the general benefit and public welfare? If so, is it sound to draw any distinction between cases in which compensation is provided and those in which it is not? In other words, if property may be taken by eminent domain simply for reasons of public advantage and benefit, why may it not be done regardless of compensa-

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[4]People *ex rel.* Busching *v.* Ericsson (1914) 263 Ill. 368, 105 N. E. 315 (garage excluded from residential district on grounds of public health and safety); Matter of McIntosh *v.* Johnson (1914) 211 N. Y. 265, 105 N. E. 414 (garage excluded from within 50 ft. of a school on grounds of public safety); Reinman *v.* Little Rock (1915) 237 U. S. 171, 176, 35 Sup. Ct. 511. The court in the last case said: "No question could be made that the general subject of the regulation of livery stables with respect to their location in a thickly populated city is well within the range of the power of the state to legislate for the health and general welfare of the people."

[5]*Ex parte* Quong Wo (1911) 161 Cal. 220, 118 Pac. 714 (laundry excluded to protect public health); *In re* Montgomery (1912) 163 Cal. 457, 125 Pac. 1070 (lumber yard excluded to protect public safety); *Ex parte* Hadacheck (1913) 165 Cal. 416, 132 Pac. 584 (brick yard excluded to protect public health).

[6]Hadacheck *v.* Sebastian (1915) 239 U. S. 394, 36 Sup. Ct. 143, affirming *Ex parte* Hadacheck, *supra,* footnote 5.

[7]Fruth *v.* Board of Affairs (1915) 75 W. Va. 456, 85 S. E. 105; see McBain, American City Progress and the Law, 76 *et seq.*, 93 *et seq.*

[8]*In re* City of New York (1901) 57 App. Div. 166, 68 N. Y. Supp. 196, *aff'd* 167 N. Y. 624, 60 N. E. 1108; Bunyan *v.* Commissioners (1915) 167 App. Div. 457, 153 N. Y. Supp. 622; Attorney General *v.* Williams (1899) 174 Mass. 476, 55 N. E. 77; United States *v.* Gettysburg Elec. Ry. (1896) 160 U. S. 668, 16 Sup. Ct. 427.

tion, under the police power, supposedly created for just this purpose?

What seems to be the truth of the matter is that the court in the instant case does consider the statute as nothing less than a valid exercise of the police power, with the added factor of compensation, but hesitates to say so in so many words, in view of the line of decisions to the contrary and of the apparent preference of courts to justify the taking of private property rights under a power of eminent domain, so called, where compensation is required, rather than under the police power, where none is given. Would it not be more accurate to transfer such cases of eminent domain, in which the court defines public use as equivalent to public advantage, to the realm of the police power, creating thereby a new type of police power,—a hybrid, if you will,—police power *with* compensation. The only difficulty with this classification might be to determine when the courts would require compensation. Perhaps the line of distinction could be drawn at such taking of private property as inured to the public welfare, but was still not for the protection of the public health, safety, order, peace or morals. Property taken for purposes similar to those in the instant case might come within this latter class.[9]

In conclusion, it must be noted that the Supreme Court has not yet expressly passed on this question. It is possible that the highest court would treat this question more frankly than did the Minnesota court and would consider it purely as an attempt to extend the police power of the state. It is not likely, however, in view of the *dictum* in *Welch* v. *Swasey*,[10] that the Supreme Court would entertain arguments to justify the exercise of the police power, as at present defined, for purely aesthetic reasons. If no compensation is provided, substantial arguments must be found to bring the ordinance within the powers of the government now recognized as legitimate.[11] But, it is submitted, were compensation provided, the Supreme Court would be likely to entertain more tenuous arguments to bring an ordinance within the conventional definition of the police power. Prior to the instant case, it has been suggested that the stabilization of realty values, which undoubtedly does result from restrictions of this sort, sufficiently subserves the public welfare to justify the exercise of the police power. In A New York court has actually decided a case on this ground.[13] In view of the fact that the Supreme Court has already declared that the police power may be used "for the benefit of property owners generally",[14] it seems possible that this contention would be sustained.

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[9]This classification would doubtless satisfy those persons who conceive of the police power as a concept amenable to accurate and closely limited definition. But the police power extends in reality to any legislative invasion of private property rights that the courts will sanction. What form such invasion may take in the future is a matter of conjecture.

[10](1909) 214 U. S. 91, 107, 29 Sup. Ct. 567. In this case the Supreme Court upheld the Massachusetts court (193 Mass. 364, 79 N. E. 745) which had declared constitutional an ordinance which regulated the height of buildings. It was sustained upon grounds of public safety.

[11]St. Louis Poster Adv. Co. *v.* St. Louis, *supra,* footnote 2 (*semble*).

[12]McBain, *op. cit.,* 121 *et seq.*

[13]*In re* Russell (1916) 158 N. Y. Supp. 162.

[14]See Welch *v.* Swasey, *supra,* footnote 10, at p. 106.